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Supreme Court, U.S.
FILED
MAY 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-_____

In The

Supreme Court of the United States

OCTOBER TERM, 1985

HUMBLE EXPLORATION COMPANY, INC.

Petitioner

v.

PHILLIPS PETROLEUM, INC.

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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May 21, 1986

QUESTION PRESENTED

Whether the real owners of a corporation, who have been prevented illegally by a bankruptcy trustee from controlling and operating their corporation, are entitled under Rule 60b(6) to have the corporation's suit against another corporation reinstated within one month after the suit was dismissed with prejudice because the attorneys hired and controlled by the bankruptcy trustee did not comply with the district court's discovery orders.

LIST OF PARTIES

The parties to the proceedings below were the Petitioner Humble Exploration Company, Inc. (now known as HECI Exploration Company, Inc.) and the Respondent Phillips Petroleum Company, Inc.

Sterling Pipeline Corporation is an affiliated corporation to Humble Exploration Company. Although not parties to the proceedings below, persons with an interest in the proceedings include the real owners of Humble: Jane H. Browning, Individually, and as Co-Independent Executrix of the Estate of William W. Browning, Jr., Deceased; Michael G. Starnes, Individually, and as Special Trustee, as Co-Independent Executor of the Estate of William W. Browning, Jr., Deceased, and as Trustee for the Browning Children Trusts; Catherine Agnes Land Starnes, Individually; Robert Holland Browning, Individually; Katherine Louise Browning Cook, Individually; and Winifred Fallon Browning, Individually; and Averille Browning Dawson and William Webb Browning, III, Individually.

Other persons with an interest in the proceedings are Don Navarro, the former bankruptcy trustee for Humble, and James S. Robertson, Jr., of Robertson, Miller & Taylor, and Scott C. Larsen of Vineyard, Drake & Miller, P.C., the former attorneys for Humble in the district court below.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATEMENT OF THE CASE	2
REASON FOR GRANTING THE WRIT	7
CONCLUSION	12
CERTIFICATE OF SERVICE	13

TABLE OF AUTHORITIES

	Page
Cases	
Bankers Mortg. Co. v. United States, 423 F.2d 73, (5th Cir.), cert. denied, 399 U.S. 927 (1970)	8
Crutcher v. Aetna Life Ins. Co., 746 F.2d 1076 (5th Cir. 1984)	8
Greater Baton Rouge Golf Ass'n v. Recreation & Park Comm'n, 507 F.2d 227 (5th Cir. 1975)	8
Link v. Wabash Railroad Co., 370 U.S. 626 (1962)	8, 9
National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976)	8

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PHILLIPS PETROLEUM, INC.

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Humble Exploration Company, Inc., now known as HECI Exploration Company, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on January 30, 1986.

OPINIONS BELOW

The Court of Appeals for the Fifth Circuit decided this case without opinion. Its judgment is reprinted in the Appendix hereto, page A-1, *infra*.

The order of the United States District Court for the Western District of Texas (Nowlin, D.J.) explaining its

reasons for dismissing the suit has not been reported. It is reprinted in the Appendix hereto, page D-1, *infra*. The district court did not write an opinion on its denial of Humble's Rule 60(b) motion; its order is reprinted in the Appendix hereto, page C-1, *infra*.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on January 30, 1984. The Fifth Circuit denied a timely motion for rehearing on February 24, 1986. The jurisdiction of this Court is invoked under 28 U.S.C., § 1254(1).

STATEMENT OF THE CASE

The facts material to consideration of the questions presented herein begin not with this case itself but with preexisting and concurrent litigation. In 1979, the Brownings filed suit in the Texas state courts against Pat S. Holloway, Humble and others for fraud and breach of fiduciary duties, seeking damages and imposition of a constructive trust on corporate stock and producing mineral interests. In order to interfere with that litigation, Holloway filed Chapter 11 bankruptcy proceedings on behalf of himself individually and on behalf of Humble. After three years of complicated proceedings, including a removal of the suit to bankruptcy court and a remand, the Brownings finally obtained a five-week jury trial in the summer of 1982. As a result of that trial, the Brownings obtained a multi-million dollar judgment and the imposition of a constructive trust on 100% of the issued stock of Humble and other companies and various producing mineral interests. Holloway and Humble appealed that judgment.

In addition, Holloway converted his individual Chapter 11 bankruptcy into a Chapter 7 bankruptcy in which Don

Navarro was appointed as the Trustee. The issued stock of Humble was held in the Holloway bankruptcy estate, and Navarro, as Trustee, succeeded to that stock. At that time, Humble was being operated by a state court appointed receiver as a result of separate but related litigation. In order to avoid conflicts between the bankruptcy trustee and a state receiver, the Brownings, Holloway and Navarro agreed that Navarro could also serve as post-confirmation Trustee of the Humble bankruptcy estate and the state receivership would be terminated. Navarro then took possession of the stock in Humble and with it the control over Humble.

After sufficient time had passed so that the Brownings were entitled to enforce their judgment under Texas law, they requested Navarro either to post a supersedeas bond during the pendency of the appeal or to turn over to them all property subject to their constructive trust, including the control of Humble. Navarro refused. The Brownings then instituted a turnover litigation in the United States District Court for the Northern District of Texas under its bankruptcy jurisdiction. They requested that court to require either Navarro or the debtors to post supersedeas bond or to turn over to the Brownings property belonging to them under the constructive trust. Ultimately, on April 1, 1985 the district court ordered Navarro to turn over all the stock and management of Humble to a representative of the Brownings. This complicated litigation has been recounted in *Browning v. Navarro*, 743 F.2d 1069 (5th Cir. 1984). This Court recently denied Holloway's petition for certiorari from the original state court suit. *Humble Exploration Co. v. Browning*, No. 85-1182 (March 5, 1986), rehearing denied, (April 28, 1986).

While the Brownings were attempting to obtain control of their company, Humble, from Navarro, this suit was filed by Humble under the management and control of Navarro, in October, 1983, in the state courts of Texas. In November of 1983, Phillips removed the suit to the United States District Court for the Western District of Texas under the provisions of 28 U.S.C., § 1441, invoking that court's diversity jurisdiction, 28 U.S.C., § 1332, Humble being incorporated in Texas and having its principal place of business there, and Phillips being incorporated in Delaware and having its principal place of business in Oklahoma.

This suit arose out of a gas purchase contract entered into by Humble and Phillips in 1979. The terms of that contract provide that Phillips would purchase gas from oil and gas leasehold estates then owned or controlled or thereafter acquired or controlled by Humble in seven Texas counties. Humble's oil wells contained gas which, if not collected, had to be flared in order to keep the wells producing. In their suit, Humble alleged generally that Phillips had failed to timely connect numerous wells, and had thereby caused a substantial loss of gas due to venting. They further alleged that on numerous occasions Phillips had operated gathering lines with pressure in excess of that called for in the contract, preventing the collection of gas from Humble's wells, and again causing those wells to vent gas. Thirdly, Humble charged that Phillips had made several misrepresentations when entering into the gas purchase contract.

The attorneys selected by Navarro to represent Humble were, in the words of the district court, "incredibly dilatory in the discovery process." After a hearing on motions for sanctions, the court found that Humble's attorneys, after asking for an extension of the date for completing discovery, conducting a conference of attorneys, and filing a proposed

pretrial order, had failed to file the required pretrial order within three months of the extend deadline. The district court filed a ten-day conditional dismissal for failure to file the proposed order. The plaintiffs then filed a motion for extension of time requesting that completion of discovery be extended to March 1, 1985, that the conference of attorneys be extended to April 1, 1985, and that the pretrial order be extended to May 1, 1985. The district court granted an extension of the discovery completion date until February 15, 1985. On February 15, 1985, attorneys for Humble filed a motion for leave to amend the complaint and moved to extend the time to complete discovery until March 31, 1985. At a hearing on March 12, 1985, counsel then appearing for Humble informed the court that because leave had not yet been granted to amend, discovery would have to extend beyond March 31, 1985 in order for Phillips to adequately prepare for the amended cause of action.

The district court also found that Humble's counsel had failed to respond to interrogatories submitted by Phillips on December 22, 1983, in which it requested a description of the damages alleged and the names of experts to be used by plaintiff. In January, 1985, Humble's counsel advised Phillips' counsel of two experts, but further informed them that it would be a waste of time to depose the experts before the close of discovery because the experts had not completed their work. On February 11, 1985, Humble's counsel produced two persons for deposition, but neither could testify as to damages, and neither had any knowledge of the particular well connections that were the subject of the suit. The district court also found on two separate occasions that Humble's counsel had failed to designate persons to testify and had failed to appear at noticed depositions.

The district court, therefore, dismissed Humble's cause of action pursuant to Fed. R. Civ. P. 37(d) because of its failure

to answer Phillips' interrogatories, its failure to appear at depositions, and its failure to comply with the discovery order entered by the court.

Approximately two weeks after the district court dismissed this case, the district court in Dallas ordered Navarro to turn over all stock in Humble to the Brownings and to resign his positions in Humble. On April 2, 1985, Navarro formally resigned as Trustee of the bankruptcy estate of Humble and delivered possession of the stock in Humble to Michael G. Starnes, as Special Trustee, and executed an appropriate stock transfer. When the Brownings' attorneys shortly thereafter conferred with the Trustee's counsel handling or supervising Humble's litigation, they learned for the first time of the status of this litigation. Throughout the course of this litigation in the district court, the litigation has been completely under the control of attorneys selected and directed by the Trustee, Don Navarro, who was simultaneously vigorously opposing delivering control of Humble to the Brownings, its rightful owners.

Upon learning of the status of this case, the Brownings quickly moved for relief under Fed. R. Civ. P. 60(b). They informed the district court that they strongly disagreed with the manner and method in which the suit had been supervised, or more accurately, ignored by the Trustee and his counsel. They assured the court that if they had been able to control and direct the progress of the litigation or to supervise the conduct of Humble's attorneys, they would have assured compliance with the court's orders. The Brownings pledged to the Court that if the Court would reinstate the case pursuant to Rule 60(b), they would carefully evaluate the files in the case, present an amended complaint if warranted, and thereafter conduct discovery in accordance with the desires of Phillips' counsel and the direction of the

district court. The Brownings told the district court that they had not yet had an opportunity to review any records but believed from information provided by the Trustee that Humble does in fact have a valuable and meritorious claim against Phillips that could be barred as a result of the dismissal with prejudice. As an indication of the validity of Humble's claims, the Brownings informed the district court that the Trustee had advised them that Phillips was tendering approximately Four Hundred Thousand Dollars ($400,000.00) for payment wrongfully withheld during the pendency of this litigation. The Brownings offered to compensate Phillips or its counsel for any reasonable costs or expenses incurred in connection with the urging and prosecution of any discovery or dismissal motions and to further pay other costs that the district court might find appropriate to award in reinstating the case.

The trial court denied Humble's Rule 60(b) motion without hearing or opinion. The Fifth Circuit subsequently affirmed without opinion.

REASON FOR GRANTING THE WRIT

The decisions below raise important and unresolved problems on the *interrelationship of Rules 60(b) and 37(d).*

This case raises in dramatic fashion the appropriate standards for applying relief under Fed. R. Civ. P. 60(b) following the imposition of sanctions under Fed. R. Civ. P. 37(d) for failure to comply with appropriate discovery orders and procedures.

This case does not involve the authority of a district court under Rule 37(d) to dismiss a plaintiff's suit with prejudice as a sanction for substantial dilatory tactics in discovery.

See, National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976). Rather this case is concerned with what standard is appropriate for judging when relief from that dismissal is appropriate under Rule 60(b).

It has been stated that Rule 60(b) should be liberally construed in order to do substantial justice. *Greater Baton Rouge Golf Ass'n v. Recreation & Park Comm'n*, 507 F.2d 227, 228-29 (5th Cir. 1975). The rule seeks to strike a delicate balance between two countervailing impulses: the desire to preserve the finality of judgments and the "incessant command of the court's conscience that justice be done in light of *all* the facts." *Bankers Mortg. Co. v. United States*, 423 F.2d 73, 77 (5th Cir.), cert. denied, 399 U.S. 927 (1970) (emphasis in original).

This Court and the lower federal courts have reasoned that a party can normally be required to suffer the adverse results of their attorney's failure to comply with court orders because the voluntary choice of an attorney lies at the heart of our representative litigation process. *Link v. Wabash Railroad Co.*, 370 U.S. 626, (1962); *Crutcher v. Aetna Life Ins. Co.*, 746 F.2d. 1076 (5th Cir. 1984). Justice Harlan specifically stated in *Link*, 370 U.S. at 633-34 (emphasis added):

> There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner *voluntarily chose this attorney as his representative in the action*, and he cannot now avoid the consequences of the acts or omissions of *this freely selected agent*. Any other notion would be wholly inconsistent with our system of representative litigation in which each party is deemed to be bound by the acts of his lawyer-agent and is considered to have "notice of all facts, notice of which can be charged upon the attorney." Smith v. Ayer, 101 U.S. 320, 326, 25 L.Ed. 955.

In this case, the Brownings, the real owners of Humble and the real persons in interest, were wholly without choice or voice in the selection of the attorney who ignored the court's discovery orders. That attorney did not report to the Brownings or take any directions from the Brownings or the Brownings' attorneys. Instead, the selection and subsequent control of the attorney-agent for Humble was completely controlled by Navarro, who was totally and openly hostile to the interests and claims of the Brownings. Additionally, Navarro was without legal authority throughout the entire course of this litigation to continue his own personal possession and control of Humble in lieu of its true owners, the Brownings. *Browning v. Navarro,* CA 3-83-0380-H, Memorandum Opinion and Order (March 21, 1985) reprinted in the Appendix hereto at G-1, *infra.*

Although the Fifth Circuit issued no opinion and, like the district court before it, gave no reason for its order denying relief to Petitioner, during oral argument the court revealed a belief that granting Petitioner any relief under Rule 60(b) would in actuality be a reversal of the district court's ruling on sanctions under Rule 37(d) and thereby undermine the district court's authority. Indeed, this analysis formed the main thrust of Phillips' argument for denying any relief to Petitioner.

Such an interpretation by the Fifth Circuit and apparently by the district court is totally and fundamentally mistaken. In *Link v. Wabash Railroad Co., supra,* this Court specifically approved the use of Rule 60(b) to change adverse actions taken as a matter of sanction, 370 U.S. at 632:

> In addition, the availability of a corrective remedy such as provided by Federal Rule of Civil Procedure 60(b) — which authorizes the reopening of cases

> in which final orders have been inadvisably entered — renders the lack of prior notice of less consequence. Petitioner never sought to avail himself of the escape hatch provided by Rule 60(b).

Thus this Court apparently intends Rule 60(b) to be used in a corrective fashion to protect clients in the appropriate circumstances from the unfair results that would obtain by imposing sanctions for the actions of their attorneys. It is difficult to conceive of a more unfair and unjust result than that which has occurred in this case. The Brownings own not only all the stock in Humble but also directly own all the producing oil and gas properties subject to the contract with Phillips in this case. The Brownings had absolutely no say in the selection of or the control of the attorneys who, in fact, represented their interests. Furthermore, they never received any meaningful reports from either the attorneys or from Navarro on the status of this case. Yet the Brownings are the ones who must ultimately bear the consequences of the court's dismissal. In contrast, Navarro, who maintained possession and control of Humble without legal authority throughout the entire course of this litigation, and who both selected and controlled the attorneys representing Petitioner in this case, suffers no detriment.[1] Thus the rationale courts traditionally employ for imposing sanctions upon the client for the actions of its attorney simply do not exist in this case.

---

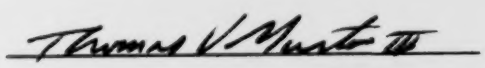
[1]In the bankruptcy court, Navarro, who received an interim trustee's fee of $10,000 per month, is currently seeking a total fee of $1.2 million for serving as Trustee of Humble for two and a half years. Ironically, for two years of this trusteeship, he spent his time opposing the delivery of the company to the Brownings, its true owners. Moreover, in the turnover action, the district court has recently held that Navarro is protected by claims of damage from the Brownings by derivative judicial immunity and has denied the Brownings leave to supplement their complaint against Navarro for conversion with a claim for the damages to the Brownings and Humble resulting from the dismissal of this lawsuit.

It is evident that the lower courts are unsure how to apply Rule 60(b) following the imposition of sanctions under Rule 37(d). This apparent judicial confusion coupled with the unique circumstances of this case strongly warrant this Court's consideration of the case. In so doing, this Court can articulate the standards that should properly be applied when considering a Rule 60(b) motion following dismissal for dilatory actions under Rule 37(d). These standards should be such as will achieve substantial justice in a case like this in which a party neither knows of nor controls the actions of an attorney acting in its behalf even though not selected by that party. When Rule 60(b) is applied, it should be based on the standards that most carefully balance and protect the interests of all parties to the litigation. The factual stance of this case presents this Court with the opportunity to announce and define those standards.

CONCLUSION

FOR THESE REASONS, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,



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Additional Counsel for Petitioner

CERTIFICATE OF SERVICE

I, Thomas V. Murto III, a member of the Bar of this Court, hereby certify that on the 27th day of May, 1986, three copies of the Petition for Writ of Certiorari in the above entitled case were mailed, first class postage prepaid, to Mr. David L. Orr of McGinnis, Lochridge & Kilgore, 1300 Capitol Center, 919 Congress Avenue, Austin, Texas 78701, counsel for the Respondent herein. I further certify that all parties required to be served have been served.

Thomas V. Murto III
Counsel for Petitioner

APPENDICES

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-1284

HUMBLE EXPLORATION COMPANY, INC.,
Plaintiff-Appellant,

versus

PHILLIPS PETROLEUM COMPANY, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Western District of Texas

(January 30, 1986)

Before CLARK, Chief Judge, TATE and DAVIS, Circuit Judges.

PER CURIAM:

The judgment appealed from is affirmed. See Local Rule 47.6. This affirmance is without prejudice to the rights of the plaintiff to move the district court to grant Rule 60(b) relief as to a claimed agreed-upon payment due to be made by defendant. Defendant contends it has paid all sums due. This court neither makes any ruling nor intimates any view with respect to the merits of this supplemental matter.

AFFIRMED

U.S. COURT OF APPEALS
F I L E D
FEB 24 1986
GILBERT F. GANUCHEAU
CLERK

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-1284

HUMBLE EXPLORATION COMPANY, INC.,
Plaintiff-Appellant,

versus

PHILLIPS PETROLEUM COMPANY,
Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas

ON PETITION FOR REHEARING

(February 24, 1986)

Before CLARK, Chief Judge, TATE and DAVIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

CLERKS NOTE:
SEE FRAP AND LOCAL
RULES 41 FOR STAY OF THE
MANDATE.

ENTERED FOR THE COURT:

United States Circuit Judge

FILED
APR 18 12[00] PM '85
CHARLES W. VAGNER, CLERK

By _____
DEPUTY

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL NO. A-83-CA-604

HUMBLE EXPLORATION CO.

versus

PHILLIPS PETROLEUM CO.

ORDER

On this date, came on to be heard Plaintiff's motion, pursuant to Rule 60(b)(6) for relief from this Court's Order entered March 20, 1985. The Court has reviewed the Motion and the entire file in this case and is of the opinion that the motion is not meritorious and should be DENIED.

IT IS HEREBY ORDERED that the Plaintiff's motion for relief from this Court's Order of March 20, 1985 brought pursuant to Rule 60(b)(6) is hereby DENIED.

SIGNED and ENTERED this 18th day of April, 1985.

/s/ JAMES R. NOWLIN
James R. Nowlin
United States District Judge

FILED
MAR 15 3³⁸ PM '85
CHARLES W. VAGNER, CLERK

By _____
DEPUTY

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL NO. A-83-CA-604

HUMBLE EXPLORATION COMPANY

vs.

PHILLIPS PETROLEUM COMPANY

ORDER

Before the Court is the Defendant's Motion for Sanctions filed in the above-styled and numbered cause. The Court has considered the Motion, the response of the Plaintiff, as well as the evidence adduced at the hearing held on March 12, 1985, and is of the opinion that the Motion is meritorious and should be GRANTED, and that this cause of action should be DISMISSED pursuant to Federal Rule of Civil Procedure 37(d).

This cause of action was filed in State Court on October 19, 1983. It was removed by the Defendants on November 4, 1983. The Defendants filed their answer on December 5, 1983. On December 28, 1983 the parties were given until March 28, 1984 to complete discovery; April 28, 1984 to hold a conference of attorneys; and May 28, 1984 to file their proposed pre-trial order. The parties filed a joint Motion for a thirty day extension of all of the deadlines on April 17, 1984; the Court granted the Motion on April 20, 1984 thereby requiring that a proposed pre-trial order be filed on or before July 28, 1984.

On November 2, 1984 the Court filed a ten day conditional dismissal for failure to file the proposed pre-trial order. The Plaintiff then filed a Motion for Extension of Time on November 13, 1984. The Plaintiff's Motion alleged that the complicated nature of this suit as well as the voluminous number of documents involved in this litigation required an extension of the discovery deadline. The Defendant opposed that Motion and alleged that the Plaintiffs had made no diligent effort to complete discovery or comply with the Court's deadlines. The Defendant noted that in the prior thirteen months the Plaintiff had not submitted any interrogatories nor taken any depositions. The only discovery the Plaintiff engaged in was requesting production of documents on April 23, 1984. At that time, the Defendant responded and offered the Plaintiff an opportunity to inspect the documents, but the Plaintiff never took advantage of that opportunity. In addition, the Defendants asserted that the Plaintiffs failed to supplement interrogatories, failed to designate corporate representatives to testify in response to a deposition notice filed on May 16, 1984, and failed to file a proposed pre-trial order or even ask for an extension until more than three months after the proposed pre-trial order deadline had expired. Consequently, the Defendants sought dismissal of this case.

On November 27, 1984, based on Plaintiffs' representation that they were having discovery problems and an assurance that they could complete discovery within the time period requested, the Court granted an extension of time requiring that discovery be completed on or before February 15, 1985; a pre-trial conference held on or before March 1, 1985; that a proposed pre-trial order be filed on or before March 29, 1985; and that the trial of this cause be set on April 9, 1985. The order noted that no further extensions would be granted in this cause of action. On December 7, 1984, the Defendant moved for a partial summary judgment. The Plaintiffs failed to respond to that motion. On February 5, 1985 the Court granted the Motion for partial judgment and ordered that the Plaintiff take nothing on two of the three claims set out in their complaint.

On February 15, 1985, the date by which discovery was to be completed in this case, the Plaintiff moved for an extension of time to complete discovery and filed a Motion for Leave to File an Amended Complaint. The proposed amended complaint added an additional Defendant and asserted two new claims including an allegation that the new Defendant was an alter-ego of Phillips, the original Defendant. The Motion to extend noted that several new witnesses would have to be deposed, and that additional discovery would be required. Although the Motion sought an extension until March 31, 1985, Plaintiffs' counsel informed the Court that he and the Defendant's counsel agreed that an extension until late spring would be necessary if the Court granted leave to amend.

On February 25, 1985, the Defendant objected to the Plaintiffs' motions. The Defendant noted that the new complaint alleged two additional claims which raised no fewer than nine new issues. The Defendant pointed out that the Plaintiffs had waited five years to allege these new claims. Further, the Defendant noted that they would be unfairly prejudiced if the Defendant's motions were granted at this late date. In addition, the Defendant noted that the Plaintiff had offered no justification for its delay in asserting the new claims. The Defendant argued that the complaint should be dismissed because the Plaintiff had failed to engage in meaningful discovery and has failed to comply with the Court's order setting discovery deadlines. Specifically, the Defendants argue that the Plaintiff failed to answer the Defendant's interrogatories, failed to produce witnesses in response to deposition notices, and failed to comply with all of the Defendant's other discovery requests.

The evidence adduced at the hearing and the record in this case indicate that the Defendants submitted interrogatories to the Plaintiff on December 22, 1983. In response to Interrogatory No. 8 the Plaintiff asserted that when damages were determined the interrogatory would be supple-

mented. It was never supplemented. Interrogatory No. 10 requested the name of experts to be used by the Plaintiff. The Plaintiff replied that when the experts were engaged the answer would be supplemented. Again, it was not supplemented. On January 25, 1985, in response to a phone call from the Defendant's counsel, the Plaintiff advised the Defendant that it would call two experts. Upon defense counsel's request that they be produced prior to the discovery deadline, Plaintiff's counsel replied that deposition of the experts would be a waste of time since they had not completed their work. Apparently, the Plaintiff knew some fifteen days before they moved for an extension that they had no intention of complying with the Court's discovery deadline.

In addition, the Plaintiff failed to designate persons to testify and failed to appear for deposition on May 24, 1984. The Defendants sent the same notice for deposition on January 29, 1985. Again, the Plaintiff failed to appear. On February 11, 1985, four days before the discovery deadline, the Plaintiff produced two persons for deposition. Neither could testify as to damages, neither had any knowledge of the well connections which were the subject of this suit, and one of the witnesses testifed that he had been advised of the deposition only the Friday before the Monday deposition.

Dismissal pursuant to Federal Rule of Civil Procedure 37(d) is obviously a very severe sanction; however, the evidence adduced at the hearing and the record in this case indicate that the Plaintiffs have been incredibly dilatory in the discovery process. It is apparent to the Court that they have done absolutely nothing in anticipation of trying this case on April 9, 1985, despite the Court's order of November 27, 1984, which expressly stated that no further continuances would be granted and that this case would be tried on April 9, 1985. Consequently, the Court is of the opinion that this cause of action should be DISMISSED pursuant to

Rule 37(d) because of the Plaintiff's failure to answer the Defendants' interrogatories, the Plaintiff's failure to appear at depositions, and the Plaintiff's failure to comply with the discovery order entered by this Court.

ACCORDINGLY, IT IS ORDERED, ADJUDGED and DECREED that the above-styled and numbered cause is hereby DISMISSED WITH PREJUDICE pursuant to Rule 37(d), costs to be paid by the Plaintiff.

SIGNED and ENTERED this 15th day of March, 1985.

James R. Nowlin
United States District Judge

FILED
MAR 15 3³⁸ PM '85
CHARLES W. VAGNER, CLERK

By _____
DEPUTY

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

CIVIL NO. A-83-CA-604

HUMBLE EXPLORATION COMPANY

vs.

PHILLIPS PETROLEUM COMPANY

JUDGE JAMES R. NOWLIN

☐ **Jury Verdict.** This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that this cause is hereby DISMISSED WITH PREJUDICE pursuant to Rule 37(d), costs to be paid by the Plaintiff, Humble Exploration Company.

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
F I L E D
APR 2, 1985
NANCY HALL DOHERTY, CLERK

By _____
DEPUTY

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. 3-83-0380-H

JANE H. BROWNING, et al.,
Plaintiffs,

versus

DON NAVARRO, et al.,
Defendants.

PARTIAL JUDGMENT

Came on for consideration in the above-styled and numbered cause the Plaintiffs' Motion for Partial Summary Judgment, the Trustee's Second Motion for Summary Judgment, and all previously filed motions. The Court, having considered the pleadings, the summary judgment evidence, the briefs of the parties and the opinion of the United States Court of Appeals for the Fifth Circuit, 743 F.2d 1069 (5th Cir. 1984), and having found that there is no genuine material issue of fact to be decided, is of the opinion that the Plaintiffs are entitled to a partial judgment as a matter of law, and that the Trustee's Second Motion for Summary Judgment and the other motions for relief should be denied.

A Memoradum Opinion and Order having been rendered by this Court on March 21, 1985, granting Plaintiffs' Motion for Partial Summary Judgment, the following order is hereby entered.

IT IS ORDERED, ADJUDGED AND DECREED that Defendant Trustee Don Navarro shall forthwith deliver Certificate No. 6 representing One Hundred Ninety-Two (192) shares of stock in Humble Exploration Company, Inc. (now known as HECI Exploration Company and hereinafter referred to as "HECI"), representing One Hunder Per Cent (100%) of the outstanding and issued shares in HECI to Michael G. Starnes as Special Trustee. The Special Trustee shall have sole authority to vote stock of HECI, to serve upon and/or reconstitute the Board of Directors of HECI and to continue the orderly ongoing operation of the company, pending further order of the Court. It is further ordered that former officers and directors of Humble Exploration Company, Inc., shall not be entitled to take any further action on behalf of the company; and it is further

ORDERED, ADJUDGED AND DECREED that upon delivery of the aforementioned stock certificate of HECI and assignment of the voting rights therein and the resignation of the Trustee as Trustee of HECI, HECI will continue operating under its confirmed Plan of Reorganization as debtor-in-possession in bankruptcy proceeding number 379-00664; and it is further

ORDERED, ADJUDGED AND DECREED that the Trustee deliver possession of all other assets of the Estate of Pat S. Holloway, Debtor, upon which a constructive trust in favor of the Plaintiffs or any of them was imposed in the Amended Judgment signed November 11, 1982, by the 162nd Judicial District Court of Dallas County, Texas, in Cause No. 79-9623-I, styled *Jane H. Browning, et al. v. Pat S. Holloway, et al.*, upon further orders of this Court; and it is further

ORDERED, ADJUDGED AND DECREED that Pat S. Holloway deliver possession of all assets in his possession, upon which a constructive trust in favor of the Plaintiffs or any of them was imposed in the Amended Judgment signed November 11, 1982, by the 162nd Judicial District Court of Dallas County, Texas, in Cause No. 79-9623-I, styled

Jane H. Browning, et al. v. Pat S. Holloway, et al., upon further orders of this Court; and it is further

ORDERED, ADJUDGED AND DECREED that Robbie Holloway deliver possession of all assets in her possession, upon which a constructive trust in favor of the Plaintiffs or any of them was imposed in the Amended Judgment signed November 11, 1982, by the 162nd Judicial District Court of Dallas County, Texas, in Cause No. 79-9623-I, styled *Jane H. Browning, et al. v. Pat S. Holloway, et al.*, upon further orders of this Court; and it is further

ORDERED, ADJUDGED AND DECREED that as long as Don Navarro has possession of any property of the Estate of Pat S. Holloway, Debtor, he shall continue to administer the same as Trustee.

DATED: April 1, 1985

Barefoot Sanders
United States District Judge

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
F I L E D
MAR 21, 1985
NANCY HALL DOHERTY, CLERK

By _____
DEPUTY

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. 3-83-0380-H

JANE H. BROWNING, et al.,
Plaintiffs,

versus

DON NAVARRO, et al.,
Defendants.

MEMORANDUM OPINION AND ORDER

This case is before the Court on the reversal and remand of a grant of summary judgment for Defendants, 37 B.R. 201, by the United States Court of Appeals for the Fifth Circuit, 743 F.2d 1069.

All of the previously filed motion and briefs are before the Court. In addition, the Court has reviewed and considered Trustee's Second Motion for Summary Judgment and Opposition to Plaintiff's Motion, filed December 21, 1984; Plaintiffs' Brief in Opposition, filed February 25, 1985; and Trustee's Reply, filed March 13, 1985.

The factual and procedural background of this case is expounded at some length in the above cited published opinions and need not be repeated here.

Plaintiffs seek to have the Trustee of the bankrupt estates provide adequate security for their state court judgment during appeal, or, failing that, to turn over the property upon which a constructive trust was impressed in their favor. From this small core radiate dozens of poison-tipped spines of legal argument, housed in literally hundreds of pages, menacingly threatening any attempts to reach the core. Following the Fifth Circuit decision, however, all but a few of these tentacles have been immobilized.

Judge Randall wrote that the remand of a case to state court terminates the jurisdiction of a federal bankruptcy court over that case. 743 F.2d at 1078. The Circuit found that the parties had complied with the terms of the January 18, 1980, remand order and the annexed stipulation and agreement, and thus the Bankruptcy court was divested of jurisdiction. *Id.* at 1086. This Court will not entertain further arguments addressed to the contention that the state proceedings were void.

Upon attachment of a constructive trust under state law upon property held by a bankruptcy estate, the bankruptcy trustee merely holds legal title to that property. *See* 11 U.S.C. § 541(d) ("[p]roperty in which the debtor holds only legal title and not an equitable interest . . . becomes property of the estate . . . only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.") Congress did not intend to authorize a bankruptcy estate to benefit from property that the debtor did not own. *In re Quality Holstein Leasing*, slip op. at 2376 (5th Cir., February 11, 1985).

Where state law impresses property that a debtor holds with a constructive trust in favor of another, and the trust attaches prior to the petition date, the trust beneficiary normally may recover its equitable interest in the property through bankruptcy proceedings. *Id.*

The "attachment" of a constructive trust does not refer to the date on which a judicial adjudication imposes a particular remedy, but to the time at which the constructive trustee

engages in either the fiduciary or wrongful conduct that necessitates the trust. *See Meadows v. Bierschwale,* 516 S.W.2d 125, 133 (Tex. 1974). By this measure, the constructive trust in this case attached well before the petition date.

Legal title only having passed into the estate, the trustee is required to turn over the property to the beneficial owners. The bankruptcy court is required to recognize those equitable interests and "perhaps the [trustee's] *sole permissible administrative act* with regard thereto would be to pay over or endorse the sums due to the beneficial owners of the property. *Georgia Pacific Corp. v. Sigma Service Corp.,* 712 F.2d 962, 968 (5th Cir. 1983) (emphasis added).

The Trustee argues that, as part of the Stipulation and Agreement, Plaintiffs agreed not to attempt enforcement of their judgment until it had been certified to a bankruptcy judge. Based upon the authorities and principles addressed above, however, the bankruptcy court has no further role in the disposition of property subject to a constructive trust. Although such a provision would have some relevance to other forms of remedies that may have been received by Plaintiffs, there is no such basis for a certification in the case of a constructive trust.

Of course, the trustee possesses the same rights as any other litigant to appeal an adverse judgment and has done so. Like any other litigant, the trustee must turn over the property subject to the judgment, or post adequate security. Texas Rules of Civil Procedure, 364(a). *See also* Rules 279a, 2072, 2276 (covering exemptions); 28 U.S.C. § 959(b).

The posting of a supersedeas bond inures to the benefit of Plaintiffs, and Plaintiffs can presumably contract away that benefit. The Trustee argues that Plaintiffs have done so in the Stipulation as follows:

> [§ 2] . . . Upon the entry of an order or judgment by the state court in said consolidated cause, the Browning Interests and/or Debtors will comply with all necessary and applicable state laws during appeal subject to the provisions set out in subparagraphs (i) and (ii) below, to wit:

(i) If said order or judgment . . . shall result in relief for the Browning Interests by way of money judgment then, in that event and to the extent the state court requires the posting of a supersedeas bond pending Debtors' or Sterlings' appeal from said judgment, if any, Debtors and Sterling shall satisfy the requirement of posting said supersedeas bond, by posting same in cash or, in the alternative, by issuing a certificate of indebtedness issued by the Bankruptcy Court in favor of the BROWNING INTERESTS secured by those specific assets to the Debtors and Sterling designated by the state court pending said appeal; and

(ii) To the extent such judgment or order includes the entry of an order, judgment or other writ decreeing the ownership of possession of property in and to the BROWNING INTERESTS, any provision of state law notwithstanding, Debtors and Sterling shall be required to post a supersedeas bond, pending their appeal, if any, of said judgment in an amount set by the State court. Under the provisions of this subparagraph (ii) the Debtors and Sterling shall satisfy their obligation to post said supersedeas bond by posting same in cash, or in the alternative, by issuing a certificate of indebtedness issued by the Bankruptcy Court in favor of the BROWNING INTERESTS in the amount fixed by the state court, which certificate of indebtedness shall be secured by property of the Debtors and Sterling other than by the property awarded to the BROWNING INTERESTS by virtue of the provisions of the state court judgment or order.

The Trustee argues that the conditions precedent to the provision of security have not been met. Specifically, he argues that the state court has not "required" the posting of a bond.

On August 26, 1982, Judge Walker issued an "Order Fixing Amount of Supersedeas Bond" at $130,000,000. Plaintiffs' Exhibit 38. It is sheer whimsy to argue, as the Trustee has through several briefs, that this order is purely an

advisory opinion stating the amount of a hypothetical bond if Judge Walker should, at some future time, decide to set one. A judge, however, particularly Judge Walker, has no discretion not to set a bond. *Weber v. Walker,* 591 S.W.2d 559, 562 (Tex.Civ.App. — Dallas, 1979). Likewise, Judge Walker's finding that no specific assets were available to secure a certificate of indebtedness was not without substance. Exhibit 33. The Court is of the opinion that the conditions precedent to the provision of security were satisfied. The Trustee's remaining arguments, concerning the safety of the property in his hands, are without basis in law.

The Trustee continues, arguing that the Stipulation is silent regarding the consequences of failing to provide security. He argues that the remedy is not forfeiture of the property, but a suit for breach of contract. Again, the court disagrees. Although the Stipulation states no consequences, state law is clear on the consequences of failure to post a supersedeas bond. *J. Stiles, Inc. v. Evans,* 658 S.W.2d 676 (Tex.App. — Dallas, 1983).

The Trustee further contends that an Order of Judge Gandy of the Bankruptcy Court entered November 1, 1982, restrains Plaintiffs from enforcing the judgment. The Order states:

> [T]he Browning Interests [and] the Receiver appointed in the Order granting immediate execution ... entered by the 162nd Judicial District Court ... and all persons acting in concert or participation ... are hereby restrained and enjoined from transferring or assigning, or attempting to transfer or assign estates except in the ordinary course of business ....

The Court is of the opinion that this Order, assuming it was not voided by Judge Gandy's previous order of abstention in the case, Trustee's Exhibit 16, does not bar Plaintiffs from taking possession of the property. Plaintiffs could hardly "transfer or assign" the properties without being in possession of them. (The receivership was subsequently vacated by agreed motion. Trustee's Exhibit 39).

The intent of the Order is clarified by reference to the Amended Application which brought it to life. Therein, Humble and Holloway state that they intend to appeal and supersede the judgment. Trustee's Exhibit at 2. Indeed, they sought the injunctive relief out of concern that Plaintiffs' seeking of immediate execution would "deprive Humble and Holloway of their rights . . . to supersede the judgment" and "could have the effect of immediately and irretrievably depriving Humble and Holloway of possession on their properties" before the judgment is superseded. *Id.* at 3. Viewed against this background, Judge Gandy's Order is not one of infinite duration depriving Plaintiffs of their rights under state law, but rather is directed to the maintenance of the status quo until such time as a final state court judgment is rendered, assuming that state law regarding the superseding of judgments is complied with. A bankruptcy court can do no more.

Miscellaneous Arguments

Suddenly, the Trustee argues that he cannot be sued in his representative capacity without leave of the Court appointing him. Any such requirement has long since been waived, by the Trustee's participation in this suit to date. Moreover, the principle underlying this requirement is that a court other than the one appointing him has no jurisdiction to entertain suits against him. This Court, however, is the Court that appointed him. *See* 28 U.S.C. §§ 151, 157.

The Trustee also argues that this suit is being conducted in violation of the automatic stay, 11 U.S.C. § 362. He cites the statutory language staying:

> (1) the commencement or continuation, including the issuance or employment of process, of a judicial . . . action against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
>
> * * *
>
> (6) any act to collect, assess, or recover a claim against

> the debtor that arose before the commencement of the case under this title.

11 U.S.C. § 362(a).

The Court is of the opinion that the automatic stay does not bar this action. This action seeks to enforce terms of the Stipulation and Agreement reached between the parties well after the commencement of the bankruptcy case. Additionally, Defendents have waived this stay by seeking and obtaining affirmative relief in this Court. *See In re Wyatt*, 6 B.R. 947 (Bkrtcy.N.Y. 1980).

Finally, the Trustee argues that pursuant to the reference to the Bankruptcy Court of the administration of the Humble and Holloway Estates, maintenance of this suit in this Court without a withdrawal of reference is improper. Plaintiffs, it is argued, should be relegated to the Bankruptcy Court to seek the requested relief. At the time of the commencement of this action, the issue of reference was governed solely by a local rule adopted in this District on October 4, 1982.[1] The rule provides that a district court may withdraw reference of a case from the bankruptcy judge at any time on its own motion. This procedure is solely rooted in the division of labor between units of the same court and bears no relation to a question of jurisdiction. The initial and continued oversight of this case by this Court, whether it is classified as a withdrawal of reference or not, is in no sense inappropriate. This Court has pending related cases on its docket, and the issues are not particularly technical questions of bankruptcy law. A federal district court is better suited than the bankruptcy court to address the questions of federalism and conflicting jurisdiction that run as undercurrents through this case. Even if a motion to refer had been before the Court before this late date, there are serious doubts as to its wisdom.

Accordingly, the Court is of the opinion that the Trustee's Second Motion for Summary Judgment is **DENIED,** and

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[1] The approach embodied in the rule was adopted, in large part, by 28 U.S.C. § 157.

Plaintiffs' Motion for Partial Summary Judgment is **GRANTED.** The Court incorporates by reference the sentiments expressed at 743 F.2d at 1086.

Plaintiffs shall promptly submit a Partial Judgment prepared in accordance with this Opinion.

SO ORDERED.

DATED: March 21, 1985.

Barefoot Sanders
United States District Judge